RECORD AND BRIEFS

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No. 16-111

In The Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the
Court of Appeals of Colorado

AMICUS BRIEF OF REV. PATRICK MAHONEY AND FREE SPEECH ADVOCATES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Rev. Patrick Mahoney was one of the petitioners in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), a case in which this Court recognized that, when men and women of good conscience disagree over the propriety of a practice, such as abortion, good-faith opposition to that practice is not discriminatory animus. Rev. Mahoney urges this Court to adopt the same approach toward the practice of same-sex marriage. Rev. Mahoney, while opposed to same-sex marriage, has a long history of pastoral care for the LGBTQ community, especially in the area of bullying. He believes all human beings should be treated with love and respect. For 40 years, he has taught on the area of human sexuality and marriage from a Biblical and orthodox Christian perspective.

Free Speech Advocates (FSA) is a legal defense project that exists to secure the First Amendment rights to engage in religious witness, peaceful sidewalk counseling, and protest of or conscientious objection to the destruction of innocent human life. FSA has appeared as amicus in this Court in previous cases addressing abortion and euthanasia. FSA is deeply concerned about the threat to conscience posed by a state's attempt to coerce a small business owner to

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[1] The parties in this case have consented to the filing of this brief. A copy of the consent letter of respondents Craig and Mullins is being filed with this brief. The blanket consent letters of petitioners and of respondent Colorado Civil Rights Commission are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from amici or counsel for amici made a monetary contribution intended to fund the preparation or submission of this brief.

become complicit in something he finds morally and religiously objectionable.

SUMMARY OF ARGUMENT

This Court recognized that just as people of good faith can disagree over abortion, people of good faith can disagree over same-sex marriage. Just as people can strive for decent and honorable reasons not to participate or be complicit in abortion, people can similarly desire for decent and honorable reasons not to participate or be complicit in same-sex marriage. Thus, there is a crucial difference between recognizing something as a right (abortion or same-sex marriage) and compelling participation in acts (abortion or same-sex ceremonies) that violate a person's conscience. This Court should adopt the same respect for conscience in the same-sex marriage context as it did in the abortion context in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

ARGUMENT

There is no state interest in coercing the unwilling sale of wedding cakes, as such. The only arguable reason for state government intervention here is an interest in eliminating invidious discrimination against groups of persons. But an individual's objection to the celebration of, or participation in, a particular *event or activity* is not the same as invidious refusal to serve a *category of persons*. This Court's *Bray* case illustrates that sensible and important distinction. Just as opposition to the act of abortion does not equate to opposition to women (the only group that can have abortions), likewise opposition to same-

sex marriage does not equate to opposition to homosexual persons (the group that typically enters same-sex marriages).

There is room enough under our Constitution for conscientious dissent even on the most hotly contested issues – *especially* on the most hotly contested issues.

I. INVIDIOUS DISCRIMINATION IS AGAINST "WHO" NOT "WHAT".

There is a fundamental difference between *invidious discrimination* on the basis of the *who* (a person's identity) and *legitimate selectivity* on the basis of the *what* (the nature of an event, service, or product). This is the common-sense difference between the professional event coordinator who categorically refuses to serve members of the U.S. Marijuana Party (www.usmjparty.com) or the National Socialist Movement (www.nsm88.org), on the one hand, and one who will handle projects for all individuals, including members of such political parties, but will just not handle official events for those organizations. This is likewise the difference between a caterer who will not serve Jews, on one hand, versus one who will just not handle a reception for a *brit milah* (ritual Jewish circumcision) because of a strong personal objection to performing circumcisions. *See, e.g.*, www.doctors opposingcircumcision.com. In each such case, the one who categorically rejects members of a group as such discriminates against the *who* – on the basis of politics or religion, in these examples – while one who declines only certain events discriminates against the *what*, which is not invidious.

A. Selectivity of products and services

Consider the basics. There is a clear difference between a restaurateur who does not serve Muslim customers, versus a restaurateur who welcomes customers regardless of religion but does not carry halal food options. Or an evangelical sculptor who won't handle projects for Catholics, versus one who welcomes Catholic patronage but, as a matter of religious conscience, will not sculpt devotional images of saints. Or a toy collector who won't serve Japanese patrons, versus one who welcomes all ethnicities but refuses, based upon painful memories from World War II, to buy or sell Japanese collectibles.

In each of these examples, the first business owner discriminates based upon the identity of the customer – Muslim, Catholic, Japanese. In the second, the owner "discriminates" based upon the nature of the product or service requested, refusing to handle certain products or services – halal meals, images of saints, Japanese toys. *Cf. Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2766 (2014) ("The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use").

Recognition of this distinction is essential to liberty and to a sensible interpretation of the constitutional law relating to nondiscrimination. One who discriminates based upon the *identity* of the patron generally[2] indulges in essentially arbitrary and

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[2]Cases where the identity of the individual is a bona fide, germane qualification (e.g., being old enough to purchase alcohol or cigarettes, or being a resident of a district eligible to vote there, or being tall enough safely to ride certain roller coasters, etc.) are a different matter.

invidious bias, withholding business from otherwise perfectly suitable patrons simply because of *who they are*. Such a person is the quintessential target of nondiscrimination laws. But the decision to supply all comers with only certain products or services, or to handle certain events but not others, *infra* § I(C), represents a business decision necessary for all commercial enterprises: how will this business operate? Importantly, that business decision can reflect a variety of motives: profit judgments, personal taste, ethical norms, religious principles, concern about brand and image, etc.

B. Targeting acts, not thoughts

Whether or not the business owner in fact deeply disagrees with some belief or practice of the pertinent class of customers is irrelevant. A refusal to serve black customers is impermissible discrimination even if the bar owner has no animosity toward blacks (maybe even is black himself), agrees they are entitled to equal rights, but nevertheless excludes them to please other, bigoted customers. On the other hand, a bar owner who serves all customers regardless of race does not discriminate even if he has the heart of Archie Bunker or Bull Connor.

Similarly, it is legally irrelevant whether a business decision reflects personal beliefs that an opponent might characterize as biased. In the examples above, the restaurateur who does not serve halal food may (or may not) harbor personal prejudice against Muslims; the evangelical sculptor who won't sculpt statues of saints may find certain Catholic devotional practices theologically repugnant, perhaps even idolatrous, and even think that Catholics are

bound for Hell; the toy shop owner who won't sell toys made in Japan may hold a grudge against all Japanese for their nation's hostilities in World War II. Anti-discrimination laws, however, target discriminatory *acts*, not bad *attitudes or thoughts*. The latter, by contrast, are sacrosanct under the First Amendment, even when repugnant to some. *Schneiderman v. United States*, 320 U.S. 118, 144 (1943) ("If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment").

Thus, nondiscrimination does not mean a customer is entitled to whatever service he or she might want. That would be a right to commandeer a business, not a right to equal treatment. A Frenchman cannot insist, on pain of a charge of nationality discrimination, that a private language school teach French in addition to Arabic and Mandarin. Instead, a customer is entitled not to be denied goods or services *because of who the patron is*. Thus, a bookstore does not discriminate on the basis of the identity of its patrons if it fails to carry Christian publications that a Christian clientele might desire, even if the owner does this *because* he is a fervently anti-Christian atheist. Conversely, the Christian bookseller does not discriminate on the basis of religion by declining to carry books promoting Hinduism, regardless of motive. In such cases customers of all stripes are welcome to patronize the store, but the seller is not obliged to add other products to satisfy a subgroup, even if that subgroup is statutorily protected from discrimination based upon its identity.

C. Selectivity regarding events

Here, of course, the respondents counter that Masterpiece Cakeshop *does* offer wedding cakes, and contend that the would-be clients did not ask anything more than those products and services the shop already offered to others. Such a rejoinder fails in several important respects.

First, there is a difference between generic, cookie-cutter products and services, on one hand, and custom projects, on the other. As the record reflects, Masterpiece Cakeshop would gladly sell to respondents Craig and Mullins any off-the-counter products the shop carries, as the shop's products are available to all patrons. But Craig and Mullins did not request items that were on the shelves. They requested a custom, tailor-made cake – a cake made specially for *their* wedding. By definition, such a service is in each instance a unique project. This situation is therefore like the customer who asks the poster shop to design a logo or message the shopkeeper finds objectionable (e.g., for an anti-immigrant rally, or a demonstration on the side of the abortion issue that the shopkeeper cannot conscientiously support), or the customer who wants to hire an artist to paint a mural for a facility that the painter finds objectionable (e.g., a tobacco shop or a porn business). That the poster maker or painter does *similar* projects for other patrons does not negate the fact that each project is unique and not "just another" of the same.

Second, from petitioners' point of view, respondents Craig and Mullins were not, strictly speaking, requesting a wedding cake at all. To Jack Phillips, their event would not be a *wedding*, but rather *a different occasion altogether*. A government

can no more require Phillips to regard same-sex marriage as truly "marriage" than could a government require private entities to regard messianic Jews as truly Jewish. *Cf. Jews for Jesus v. Jewish Community Relations Council*, 768 F. Supp. 467, 468-69 (S.D.N.Y. 1991) (various private entities objected to providing or purchasing services that would arguably associate them with the group Jews for Jesus because of their belief that Jews for Jesus is not in fact properly considered Jewish). As this Court has explained,

> If there is any fixed star in our constitutional constellation, it is that *no official*, high or petty, *can prescribe what shall be orthodox* in politics, nationalism, religion, or other matters of opinion *or force citizens to confess by word* ***or act*** *their faith therein*. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphases added).

Third, the crucial distinction between invidious discrimination against *a group* and declining to provide a *product or service* also applies to declining to serve an objectionable *event*. The fact that a restaurant – a classic place of public accommodation – hosts special events in its banquet rooms does not mean the owners cannot turn away events that they find deeply objectionable (a celebration of Planned Parenthood or the National Rifle Association, a Black Mass, a dinner honoring *Hustler* publisher Larry Flynt). Likewise, a professional sound engineer who regularly handles the technical aspects of a variety of public events can object to handling the sound system

for a KKK or Antifa rally, or a pro- or anti- rally for a particular cause or candidate, etc., without engaging in invidious discrimination against the members of a protected group. The selectivity an owner or professional exercises in such cases relates to the *what* (the occasion), not the *who* (the identity of the participants). Such selectivity is no more invidiously discriminatory than the print shop that declines to make reproductions of hate speech.

To be sure, the distinction is less obvious when the service or product is closely linked to a particular group. While anyone can buy and wear a yarmulke, the practice is characteristic of Judaism, which is why "[a] tax on wearing yarmulkes is a tax on Jews." *Bray*, 506 U.S. at 270. But a tax on "wearing yarmulkes" is quite different from a decision not to sell yarmulkes. A tax on "wearing" yarmulkes is an imposition on "those persons who wear yarmulkes" – the "who," not the "what". By contrast, a decision of a haberdasher not to offer yarmulkes (or mitres, for that matter) is not discrimination against those who wear yarmulkes (or mitres). While avoiding a tax on wearing yarmulkes would require individuals to forswear that practice, a particular merchant's inventory decisions have no such consequence. Individuals retain their freedom to wear their preferred headgear; the merchant retains the freedom not to be dragooned into selling those items. And as noted above, it is not relevant whether the haberdasher declines to offer such products because of a principled antipathy to the religion (Judaism or Christianity) such head coverings reflect. After all, no one is required to profess or even act as if any particular religion, creed, or ideology is correct, desirable, or beneficial. The curmudgeon and

the idealist are alike entitled to their confessional autonomy.

Same-sex marriage is no exception to this rule. While this Court has stated that "[o]ur decisions have declined to distinguish between status and conduct in this context," *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010), that statement simply echoed (and cited) the notion from *Bray* discussed above. That is, when a government targets *those who* engage in behavior characteristic of a group – praying a Rosary, wearing a yarmulke, engaging in same-sex activity – it targets the group itself. But Jack Phillips does not refuse to serve "*those who* are in a same-sex marriage" or "*those who* are entering a same-sex marriage." Rather, he declines to help celebrate the same-sex marriage itself.[3] This Court has already recognized the difference. In *Hurley v. Irish-American GLIB*, 515 U.S. 557 (1995), the parade organizers did not "exclude homosexuals as such," *id.* at 572, but simply invoked their constitutional right not to let their parade become a platform for celebrating homosexuality, *id.* at 570, a constitutional right this Court unanimously endorsed. Jack Phillips likewise objects to having his business conscripted to celebrate same-sex marriage.

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[3]The Colorado Court of Appeals failed to grasp this basic distinction. *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281-82 (Colo. App. 2015).

II. THE *BRAY* CASE ILLUSTRATES THE CORRECT APPROACH.

In the abortion context, this Court, viewing some twenty years of struggle in the wake of *Roe v. Wade*, 410 U.S. 113 (1973), acknowledged that "men and women of good conscience can disagree" over the issue of abortion, *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), and that there were "common and respectable reasons for opposing" abortion, *Bray*, 506 U.S. at 270. Opposition to abortion – even direct, physical obstruction, as in *Bray* – therefore did not qualify as "animus" against a class (namely, women, the only sex capable of obtaining abortions). 506 U.S. at 269-74. As this Court explained, discrimination requires that the act in question be taken *"by reason of"* the protected characteristic. *Id.* at 270 (emphasis in original). Members of the group must be targeted *"because they are"* members, *id.* (emphasis in original), i.e., on the basis of the *who*, not the *what*, *id.* at 272 n.4 ("the characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion"). Thus, the very different purpose or motive of "stopping" a "practice" (there, abortion) would not qualify as discrimination unless such opposition was, in essence, inherently class-based. *Id.* at 270. But that proposition was not "supportable." *Id.* As this Court explained, even though as a matter of biology only women could get abortions,[4] "it cannot be denied that

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[4] "While it is true . . . that only women can become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex-based classification. . . . Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because

there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class." *Id.* As the Court concluded:

> Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism.

Id. at 274.

The same logic holds for same-sex marriage. This Court has expressly recognized that men and women of good conscience can disagree over same-sex marriage. "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). It follows that opposition to the *what* – same-sex marriage – cannot be equated with opposition to the *who* – homosexual persons. There are common and respectable reasons for opposing same-sex unions, whether as a matter of adherence to "divine precepts," *id.* at 2607, or "for other reasons" grounded in secular principles, *id.* That same-sex marriage is typically[6]

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of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 271-72 (internal quotation marks and citations omitted).

[6]But not always: straight couples can enter same-sex marriage as well, as has already happened. *E.g.*, "Dunedin mates tie the

engaged in by persons of homosexual orientation no more refutes that proposition than does the fact that women, and only women, can get pregnant and thus have abortions.

* * *

If opposition to same-sex marriage, like opposition to abortion, reflects decent and honorable personal tenets, and not invidious discrimination, then the state has no anti-discrimination interest sufficient to overcome Jack Phillips's constitutionally protected liberty not to facilitate or celebrate activities that he deeply believes are sinful.

CONCLUSION

As this Court observed more than a half century ago, in words that resonate today,

> we should not overlook the fact that we are a heterogeneous people. In some of our larger cities a majority of the school children are the offspring of parents only one generation, if that far, removed from the steerage of the immigrant ship, children of those who sought refuge in the new world from the cruelty and oppression of the old, where men have been burned at the stake, imprisoned, and driven into exile in countless numbers for their political and religious beliefs. Here they have hoped to achieve a political status as citizens in a

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knot at Eden Park," *Otago Daily Times* (Sept. 13, 2014); "Marriage of two straight men for radio competition angers gay rights group," *The Guardian* (Sept. 11, 2014); "In Tanzania, straight women are marrying one another," *New York Times* (Aug. 2, 2016).

> free world in which men are privileged to think and act and speak according to their convictions, without fear of punishment . . . .

Schneiderman, 320 U.S. at 120. Jack Phillips is being punished for his adherence to a belief that the government condemns. This Court should reverse the judgment of the Colorado Court of Appeals.

Respectfully submitted,

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